Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-1808

JAMES BURNETT McKAY LAING,
PETITIONER,

v.

UNITED STATES OF AMERICA ET AL.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Supreme Court.

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Supreme Court of the United States.

OCTOBER TERM, 1974.

No.

JAMES BURNETT McKAY LAING,
PETITIONER,
v.
UNITED STATES OF AMERICA ET AL.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Supreme Court.

The petitioner, James Burnett McKay Laing, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 2, 1974.

Opinions Below.

The opinion of the Court of Appeals (App. A, *infra*) is not yet reported. The opinion of the District Court is reported at 364 F. Supp. 469 (1973) (App. B, *infra*).

Jurisdiction.

The judgment of the Court of Appeals was entered on May 2, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Whether the Internal Revenue Service can employ 26 U.S.C. § 6851 to terminate a taxpayer's taxable year without following the procedure prescribed in 26 U.S.C. § 6861?

2. Whether the failure of the Internal Revenue Service to follow the procedure prescribed in 26 U.S.C. § 6851, if it is required to do so, is sufficient error to entitle the taxpayer to injunctive relief?

3. Whether the procedures followed by the Internal Revenue Service in performing its jeopardy assessment and seizure conformed to the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution?

Statutes Involved.

All pertinent statutes appear in Appendix C.

Statement.

On May 31, 1972, petitioner, a citizen of New Zealand, entered the United States from Canada on a B-2 visa. On June 24, 1972, petitioner and two companions attempted to enter Canada by way of Vermont but were refused entry into Canada by Canadian officials. Petitioner returned to the United States where he was stopped in an automobile by United States Customs officials in Derby, Vermont. The customs officials conducted a search and discovered a suitcase containing approximately $310,000 in the engine compartment of the automobile and petitioner and his companions were detained at the border.

Later that day, Fulton Fields, the District Director of the Internal Revenue Service for the District of Vermont was advised by custom officials of the above facts, and relying on them, found that the petitioner and those with him were in the process of putting their assets beyond the reach of the government by removing them from the country, thereby tending to prejudice or render ineffectual the collection of the tax alleged to be due. Agent Fields then terminated the 1972 taxable years of the three individuals pursuant to 26 U.S.C. § 6851. Agent Fields sent two internal revenue agents, Joseph O'Kane, Chief of the Intelligence Division for the District of Vermont, and James Perry, Asst. Chief of the Collection and Tax Service Division, Internal Revenue Service, Boston, Massachusetts, to the place of petitioner's detainment to take steps necessary to collect the tax liability of the petitioner and his companions.

The agents interviewed petitioner and his associates and demanded immediate payment of their tax liabilities in the amount of $310,000 for each individual. Petitioner and his associates refused to make payments of their alleged tax liability and the agents contacted the Internal Revenue Service Center in Andover, Massachusetts, and requested and received orally a tax assessment upon each person in the amount of $310,000. The agents orally communicated the assessments to the petitioner and his associates, and after a second refusal to make payment, the agents seized the money and applied it to the tax liabilities of the three individuals.

Subsequently, on June 29, 1972, Edward Gallagher, Acting Director of the Internal Revenue Service in Burlington, Vermont, sent petitioner a written declaration, made pursuant to 26 U.S.C. § 6851, informing petitioner that he was placing his assets beyond the reach of the government and,

thus, his taxable year of 1972 was terminated and a tax of $195,985.55 for the period from January 1, 1972, to June 24, 1972 was assessed and made payable.

On July 15, 1972, petitioner filed an equitable action seeking an injunction against the continued possession by the Internal Revenue Service of the seized money and seeking also a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy of his property were made were unconstitutional. On September 18, 1972, the respondents filed a motion to dismiss, or, in the alternative, for summary judgment. After hearings upon these matters, on September 12, 1973, the District Court entered an opinion and order which granted the government's motion. The District Court opinion was based substantially on the holding in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973), in which the United States Court of Appeals for the Second Circuit stated that § 6861 did not apply in the case of a jeopardy assessment made in respect to a departing or concealing taxpayer assessed under § 6851. Petitioner appealed and the court of appeals affirmed, adhering to its decision in *Gray, supra*.

Reason for Granting the Writ.

This case involves the construction of several sections of the Internal Revenue Code, particularly §§ 6851 and 6861, which establish the statutory procedure for jeopardy assessments and seizures. The interpretation of the statute employed in this case (26 U.S.C. § 6851) by the court below is in direct conflict with the recent decisions of the Court of Appeals for the Sixth Circuit in *Rambo* v. *United States*, 492 F. 2d 1060 (1974), and in *Hall* v. *United States*, No. 73-1614.

Consideration by this Court of the issues presented is necessary to clarify the procedures to be followed by the Internal Revenue Service in jeopardy assessment situations, to resolve the conflict between the Circuits, and to afford authoritative guidance in pending cases.[1]

The court below affirmed the dismissal of petitioner's complaint, relying on its decision in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973). In *Gray* the court adopted the position of the Seventh Circuit Court of Appeals in *Williamson* v. *United States*, 31 A.F.T.R. 2d 800 (1973), where it was stated:

> "... the deficiency notice requirement cannot be read into § 6851 because the assessment made under the section is not a deficiency as defined in § 6211. That section defines a deficiency as the amount by which the 'tax imposed' exceeds the amount shown on the tax return. The assessment in this case was not an imposed tax, but merely an amount which the I.R.S. believed justified the termination of the taxable year. Since no return had been filed at the date of the assessment, no deficiency was determinable." *Gray, supra*, 479 F. 2d at 24.

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[1] The statutory construction issues presented in this petition were raised and decided against the Government in the following cases: *Schreck* v. *United States*, 301 F. Supp. 1265 (D. Md. 1969); *Clark* v. *Campbell*, 341 F. Supp. 171 (N.D. Tex. 1972), argued on December 4, 1973 (not yet decided), before the United States Court of Appeals for the Fifth Circuit, No. 73-2147; *Lisner* v. *McCanless*, 356 F. Supp. 398 (D. Ariz. 1973). The Government's position was sustained in the following cases: *Williamson* v. *United States*, 31 A.F.T.R. 2d 800 (7th Cir. 1973); *Willits* v. *Richardson and O'Donnell*, 32 A.F.T.R. 2d 73-5474 (S.D. Fla. 1973), argued on May 16, 1973 (not yet decided), before the United States Court of Appeals for the Fifth Circuit, No. 73-3163.

This holding fails to conform to the statutory requirements of the pertinent sections of the Internal Revenue Code of 1954.

1. The court's holding is predicated on two assumptions: (1) That in a jeopardy assessment situation the I.R.S. can find its assessment authority in a provision outside the jeopardy assessment scheme, subchapter A of Chapter 70;[2] and (2) That in a short year jeopardy assessment under § 6851, the matter assessed is not a "deficiency." Both the legislative history of the pertinent sections and their specific language evidence that these assumptions are erroneous.

Section 250(g) of the Revenue Act of 1918 provided the I.R.S. with the power to terminate the taxable year before its completion and to declare taxes for the short period immediately due and payable once the I.R.S. had found that there existed prejudicial activity by the taxpayer which threatened the future collectability of the taxes. This section, which has been repeatedly re-enacted in essentially identical language,[3] now stands as § 6851 of the Internal Revenue Code.

Under the 1918 Act, the short term taxpayer was in the same position as any other taxpayer against whom an assessment had been made—*i.e.*, he had to pay the tax first and then bring a refund suit later.

In succeeding revenue acts—first in 1924, then in 1926—Congress sought to mitigate the harshness of the

[2] 26 U.S.C. §§ 6851-6864, herein collectively cited as subchapter A of chapter 70.

[3] Section 250(g) of the Revenue Act of 1921, 42 Stat. 267, § 282 of the 1924 Act, 43 Stat. 302; § 285 of the 1926 Act, 44 Stat. 68; § 147 of the 1928 Act, 45 Stat. 836; § 146 of the 1932 Act, 47 Stat. 217; § 146 of the 1936 Act, 49 Stat. 1703; § 146 of the Internal Revenue Code of 1939, 53 Stat. 63; and § 6851 of the Internal Revenue Code of 1954, 68A Stat. 833.

pay first - litigate later rule. See H.R. Rep. No. 179, 68th Cong. 1st Sess. 7 (1927). In 1924, Congress established a non-prepayment forum, the Board of Tax Appeals. This forum, coupled with 279(b), which required the I.R.S. to send the normal, as distinguished from the jeopardy, deficient taxpayer a notice, provided some respite for the dissatisfied taxpayer in the non-jeopardy situation. The power of the I.R.S. was virtually unaffected, however, in those cases in which it believed the assessment or collection of a deficiency would be jeopardized by delay; for in the jeopardy assessment situation under § 274(d) no deficiency notice was required. The only way in which the jeopardy assessment taxpayer under this provision could get to the Board of Tax Appeals was by filing a claim of Abatement and posting a bond under §§ 279(a) and (b) of the 1924 Code. Thus, if the taxpayer could not post a bond, his only available relief again was to pay first and sue for a refund later.

The Revenue Act of 1926, however, made a fundamental change in the rights and remedies of jeopardy income taxpayers. Whereas previously they were barred from the Board of Tax Appeals unless they could post a bond, they were now given the right to a re-determination of the jeopardy assessment by the Board of Tax Appeals, although after the assessment was effectuated. The I.R.S. was thus required by § 279(a) of the 1926 Act to send a notice of deficiency to the jeopardy taxpayer within 60 days after making the assessment. This enabled the jeopardy taxpayer, under § 274(a), to petition for an adjudication by the Board of Tax Appeals within 60 days of the mailing of the deficiency notice. This procedure has been carried over to the present time with minor changes and is now set forth in §§ 6861, 6212(a) and 6213(a) of the 1954 Code.

Section 6861, like its predecessor § 279(b) of the Act of 1926, requires the I.R.S. to mail a deficiency notice to the taxpayer within 60 days of the date of the jeopardy assessment and the jeopardy taxpayer can now petition for a re-determination of the deficiency by the Tax Court, within a period of 90 days.

This development of the tax law clearly indicates an intent by Congress to mitigate the harshness of the pay first-litigate later rule by making available to all income taxpayers, both normal and jeopardy, the Tax Court as a non-prepayment forum.

> "It is inconceivable . . . that Congress could have intended to have given this minimal procedural protection to jeopardy taxpayers against whom a deficiency is assessed at the end of the taxable year but not to taxpayers whose year is terminated under Sec. 6851." *Rambo, supra,* 492 F. 2d at 1064.

By enacting the Revenue Act of 1926, Congress sought to mitigate the harshness of the pay first-litigate later rule by requiring the I.R.S. in jeopardy situations to adhere strictly to the procedures set forth in the jeopardy provisions. This intent was carried over to the Services' operation under the present Revenue Code; and requires, therefore, the Service both to follow the procedural safeguards of subchapter A of Chapter 70 of the 1954 Code and to find its assessment authority within these provisions as well.

This interpretation of the historical development of the Internal Revenue Code comports with the language of the pertinent provisions. Section 6216(2) of the 1954 Code provides:

> "For procedures relating to jeopardy assessment see subchapter A of Chapter 70."

This provision, consistent with the historical development described above, requires the I.R.S. to follow the procedures outlined in the jeopardy assessment provisions, subchapter A of Chapter 70. Only § 6861 of subchapter A of Chapter 70 contains assessment authority and it likewise requires the Service to send a deficiency notice to the jeopardy income taxpayer. It provides in pertinent part:

> "6861. [Jeopardy assessments of income, estate, and gift taxes.]
>
> "(a) Authority for Making—If the Secretary or his delegate believes that assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.
>
> "(b) Deficiency letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment."

The court below held in *Gray, supra,* that the Service need not follow the deficiency notice requirement in the short-term jeopardy assessment situation under section 6851.

> "Since no return had been filed at the date of the assessment, no deficiency was determinable." *Gray, supra,* 479 F. 2d at 24.

By this statement, the court both misinterpreted the term "deficiency" and failed to recognize the existence of cer-

tain provisions of the Code and regulations promulgated by the Service.

Section 6211(a) of the 1954 Code defines deficiency as the amount by which the tax imposed exceeds the amount shown as the tax by the taxpayer on his return. Section 443(a)(3), which the court below failed to mention in its opinion in *Gray* and in *Laing*, requires a return to be filed by the taxpayer when the Secretary terminates the taxable year under § 6851. The taxpayer was not asked nor did he file such a return in this case. The absence of the return, however, does not mean, as the court below held, that "no deficiency was determinable." The plain, clear unequivocable language of the regulations promulgated by the Service indicates that if no return is filed, or if the return is filed but does not show any tax, "the deficiency is the amount of the tax imposed by subtitle A, chapter 11, or chapter 12" *Rambo, supra,* 492 F. 2d at 1064; see also, Revenue Regulations, § 301, 6211-1(a). In addition to the specific language of the code, § 6211(a) and the regulation promulgated to interpret it, the actions of the Service clearly indicate that a tax was imposed. On June 29, 1972, the Service sent petitioner a correspondence informing him that his taxable year, 1972, had been terminated and a tax of $195,985.55 for the period from January 1, 1972, to June 24, 1972, was assessed and made payable. *Laing, supra,* 364 F. Supp. at 471. At this point, petitioner was clearly a debtor of the United States Government. And by his earlier action at Derby, Vermont, where he both refused to acknowledge his tax liability and refused to pay his alleged liability, the petitioner was clearly denying his indebtedness to the United States. Under these circumstances, the tax imposed, $195,985.55, became the deficiency. Furthermore, § 6211(a) in no way limits the definition of a "deficiency" to the determination made only at the conclusion of the full taxable year.

In summary, both the legislative history and the specific language of the pertinent provisions of the 1954 Code clearly indicate that Congress intended for the Service to follow the procedures, both as to assessments and as to other procedural matters, outlined in subchapter A of Chapter 70.

2. There is no question regarding the right of the jeopardy taxpayer to enjoin the collection of the tax if the Service fails to adhere strictly to the notice requirement of subchapter A of Chapter 70, in making jeopardy assessments. This right is specifically granted by § 6213(a), which provides, in pertinent part:

> "Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B [§§ 1-1552, 2001-2524 of this title] . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer. . . ."

This provision is further evidence of the strong Congressional intent requiring the Service to adhere strictly to the procedures outlined in the jeopardy assessment provisions.

3. If the Code were interpreted as the Service suggests, significant constitutional problems would arise. For, while it has been held that the summary assessment and collection procedure for collecting the internal revenue of the United States is constitutionally permissible, *Phillips* v. *Commissioner of Internal Revenue,* 283 U.S. 589, 51 S. Ct. 608 (1931), this procedure has been justified on the basis that the taxpayer has adequate post-seizure access to the courts. The procedures followed by the Service in this case and accepted by the court below, however, limit the taxpayer's access to a judicial forum for a refund suit which cannot be commenced until at least six months after

the taxpayer files his full term tax return. *Gray, supra,* 479 F. 2d at 24. *Laing* v. *United States,* F. 2d (2d Cir. 1974) No. 73-2537. The necessity for the taxpayer to endure this tremendous delay between summary assessment and the seizure under § 6851 and access to a judicial forum to contest the Service's action renders this procedure in violation of the Due Process clause of the United States Constitution.

To be sure, *Phillips* was recently cited with approval by this Court in *Fuentes* v. *Shevin,* 407 U.S. 67, 92, 92 S. Ct. 1983, 2000 (1972). *Phillips, supra,* was predicated, however, on the fact that the taxpayer was afforded an *adequate* opportunity to contest the Government's actions. This fact was reaffirmed in *Fuentes, supra.* Further, in *Fuentes, supra,* 407 U.S. at 90, 92 S. Ct. at 1999, the court balances the "postponement" of judicial access against the situation requiring it to determine if the need is "truly unusual." A similar balancing of interests was performed by this court in *Goldberg* v. *Kelly,* 397 U.S. 254, 262-263, 90 S. Ct. 1011, 1017-1018 (1970).

The procedure followed by the Service in this case and accepted by the court below totally ignores this balancing of interest; for, it restricts the taxpayer's judicial access to a refund suit and thereby prolongs his grievous loss for absolutely no compelling governmental interest. All other jeopardy income taxpayers are afforded a prompt opportunity for litigation in the Tax Court.

Moreover, during the period between assessment and seizure under § 6851, as employed by the Service in this case, and the taxpayer's access to a judicial forum, the Government's interests are completely secured while the taxpayer's interests are just as completely ignored. The *Phillips-Fuentes-Goldberg* trilogy recognizes normal due

process exceptions but finds justification in the postponement of judicial access for a *reasonable* length of time. Indeed, this court stated in *Goldberg, supra,* 397 U.S. at 266, 90 S. Ct. at 1019, that the drain on the governmental resources could be minimized by developing procedures for "prompt pre-termination hearings." In this case, the procedure followed by the Service violates due process—*i.e.,* if the Government's interpretation prevails—precisely because it is totally devoid of any notion of a "prompt" post-seizure hearing in a situation where no compelling governmental interest exists to justify the unnecessarily long delay.

Conclusion.

For the above discussed reasons, it is respectfully requested that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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CRANE, INKER & OTERI,
Attorneys for the Petitioner.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

No. 707—September Term, 1973.

(Argued April 8, 1974 Decided May 2, 1974.)

Docket No. 73-2537.

JAMES BURNETT McKAY LAING,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA, JOHN M. WALTERS, Commissioner of Internal Revenue Service, FULTON D. FIELDS, District Director of Internal Revenue Service, District of Vermont, JAMES R. PERRY, Chief of Collection Division, District of Vermont,
Defendants-Appellees.

Before:

FRIENDLY AND TIMBERS, *Circuit Judges,* AND THOMSEN, *District Judge.**

Appeal from a judgment of the District Court for the District of Vermont, Albert W. Coffrin, *Judge,* dismissing plaintiff's complaint, which sought an injunction against the continued possession by the IRS of money allegedly

* Of the District of Maryland, sitting by designation.

belonging to him and a declaratory judgment that the provision of the IRC under which the assessment and levy on his property were made were unconstitutional.

Affirmed.

RUDOLPH F. PIERCE, Boston, Massachusetts (Joseph S. Oteri, Kevin M. Keating, Martin G. Weinberg, Crane, Inker & Oteri, Boston, Massachusetts, of counsel), *for Appellant.*

ROBERT S. WATKINS, Attorney, Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks, Bennet N. Hollander, Attorneys, Department of Justice, Washington, D.C., and George W. Cook, United States Attorney for the District of Vermont, of counsel), *for Appellees.*

PER CURIAM:

Plaintiff appeals from the judgment of the district court dismissing plaintiff's complaint, which sought an injunction against the continued possession by the Internal Revenue Service of money allegedly belonging to him and a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy on his property were made were unconstitutional. The facts are set out in the opinion of the district judge, 364 F. Supp. 469, at 470, 471, and are not disputed.

On appeal plaintiff argues: (1) that the Government cannot assess a taxpayer's tax liability pursuant to 26 U.S.C. 6201 unless or until the taxpayer, or the Secretary

or his delegate on behalf of the taxpayer, files a tax return; (2) that the IRS cannot terminate a taxable year and make a jeopardy assessment under § 6851, but must proceed under § 6861; (3) that the assessment and seizure in the instant case constituted a denial of due process, and (4) that the district court was not without jurisdiction to grant relief. In effect, plaintiff is asking the Court to reconsider and overrule *Irving* v. *Gray,* 479 F.2d 20 (2 Cir. 1973).

We affirm the dismissal of the complaint. Notwithstanding the recent decision of the Sixth Circuit in *Rambo* v. *United States,* —— F.2d —— (February 12, 1974), we adhere to our decision in *Irving,* which discussed and declined to follow the decisions upon which *Rambo* was largely based, particularly *Schreck* v. *United States,* 301 F. Supp. 1265 (D. Md. 1969). See 479 F.2d at 23, 24. The facts and applicable principles in the instant case are essentially similar to those in *Irving.* Plaintiff was attempting to take some $300,000 in cash out of this country in a suitcase in the engine compartment of his automobile. A jeopardy assessment was clearly justified. So far as the record shows, no deficiency has yet been determined and plaintiff therefore has not yet had access to the Tax Court. But he has had the right, at any time, to file a return showing the amount of any tax due and to file an action in the appropriate district court six months thereafter to recover any claimed overpayment as a result of the jeopardy assessment and seizure of his money. Int. Rev. Code of 1954, §§ 7422 (a) and 6532 (a); T.R. 301.604-3 (b) (1958); *Irving* v. *Gray,* 479 F.2d at 24.

Actions to restrain the assessment or collection of federal taxes are generally barred by § 7421. This case does not fall within any of the exceptions enumerated in that section; nor does it fall within the exception created by

Enochs v. *Williams Packing Co.*, 370 U.S. 1 (1962), i.e., where (1) "it is clear that under no circumstances could the Government ultimately prevail" and (2) "equity jurisdiction otherwise exists". See *Irving* v. *Gray*, 479 F.2d at 25.

Affirmed.

Appendix B.

UNITED STATES DISTRICT COURT.
DISTRICT OF VERMONT.

Civil Action No. 6661.

September 12, 1973.

JAMES BURNETT McKAY LAING
v.
UNITED STATES OF AMERICA ET AL.

[364 F. Supp. 469]

Opinion and Order.

COFFRIN, District Judge.

On July 15, 1972 plaintiff filed an action seeking an injunction against the continued possession by the Internal Revenue Service (IRS) of money allegedly belonging to him and a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy on his property were made were unconstitutional. A flurry of motions to accelerate the course of this proceeding were filed shortly after the complaint and plaintiff attempted to depose various federal officials which the Government vigorously opposed. On September 18, 1972 the IRS filed a motion to dismiss or in the alternative for summary judgment. Hearings were held on the various motions on October 24, 1972 and July 31, 1973. Taking the facts in the light most favorable to the plaintiff and from

the affidavits filed by the Government which plaintiff concedes are accurate as far as they go, we find the following factual situation before us. On May 31, 1972 plaintiff, a citizen of New Zealand, entered the United States from Canada on a B-2 visa.[1] On June 24, 1972 plaintiff and two companions departed from the United States to Canada by way of Vermont but were refused entry into Canada by Canadian officials. As a result, plaintiff returned to the United States where he was stopped by U. S. Customs officials at Derby, Vermont. A suitcase containing approximately $310,000[2] was found in the engine compartment of the automobile and plaintiff, his companions and the money were detained at the border. On the same day, Fulton Fields, the District Director for IRS in Burlington, Vermont, was advised by customs officials of the above facts and, relying on them, found that plaintiff and those with him were in the process of putting their assets beyond the reach of the Government by removing them from the country thereby tending to prejudice or render ineffectual the collection of the tax. Upon making this finding, Fields terminated the 1972 taxable years of the three individuals and sent two IRS agents, Joseph O'Kane, Chief of the Intelligence Division, IRS, Burlington, Vermont, and James Perry, Assistant Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, Boston, Massachusetts, to the border to take the steps necessary to collect the tax liabilities of these persons. Upon arriving at the border, the IRS agents interviewed plaintiff and his associates and demanded payment of tax from each in the amount of $310,000. Upon their refusal, the agents contacted the IRS Service Center in Andover, Massachusetts,

[1] 8 C.F.R. § 214.2(b) (1973).

[2] According to IRS affidavits, the actual amount seized was $306,896.50, but plaintiff claims he was in possession of $310,000.

and requested and orally received a tax assessment upon each person in the amount of $310,000. These assessments were communicated orally to the plaintiff by the IRS agents and after a second refusal, the sum of $306,896.50 was seized from the suitcase and applied to the tax liabilities of each person in the car.

On June 29, 1972, Edward Gallagher, Acting Director of IRS in Burlington, Vermont, sent plaintiff a written declaration made pursuant to 26 U.S.C. § 6851[3] that plaintiff was placing his assets beyond the reach of the Government and thus his taxable year 1972 was terminated and a tax of $195,985.55 for the period from January 1, 1972 to June 24, 1972 was assessed and made payable. This letter was sent to the address plaintiff gave U. S. Customs officials but it was returned to IRS "addressee unknown—no such street and number."

[3] 26 U.S.C. § 6851(a)(1) provides that:

(a) *Income tax in jeopardy.*—

(1) *In general.*—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

The plethora of theories relied upon by plaintiff can be reduced to three major contentions:

1). That the procedures employed by the IRS summarily deprived plaintiff of his property without a hearing in contravention of the Fifth Amendment to the United States Constitution;

2). The IRS's assessment of tax and levy of plaintiff's money was not in conformity with the applicable sections of the Internal Revenue Code and thus injunctive relief is warranted.

3). Assuming the IRS properly followed the Code, it acted arbitrarily and capriciously in seizing plaintiff's money.

Plaintiff's effort to obtain declaratory relief in this action must fail because the plain wording of the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, specifically excludes controversies concerning federal taxes. Thus, questions involving federal taxes may not be considered under the declaratory judgment section and the federal courts are without jurisdiction to enter declaratory judgments in such cases. United States v. Teitelbaum, 342 F.2d 672 (7th Cir. 1965), cert. denied, 382 U.S. 831, 86 S.Ct. 71, 15 L.Ed.2d 75 (1965); Standard Oil Co. (N.J.) v. McMahon, 139 F. Supp. 690 (S.D.N.Y.1956), aff'd, 244 F.2d 11 (2d Cir. 1956).

It is also settled beyond controversy that summary attachment for the collection of internal revenue is constitutionally permissible and does not run afoul of the procedural requirements of due process. Thus, no hearing was required before plaintiff's property was seized. Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931); Parrish v. Daly, 350 F.Supp. 735 (S.D.Ind.1972). The holding in Phillips v. Commissioner, *supra*, was recently reaffirmed in Fuentes v. Shevin, 407 U.S. 67, 91-92, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

Plaintiff's constitutional and declaratory judgment contentions being fruitless, his case must rise or fall solely on the provisions of the Internal Revenue Code. In seeking to restrain the assessment or collection of a tax, plaintiff must come within one of the narrow exceptions to the anti-injunction provisions of 26 U.S.C. § 7421(a). Plaintiff contends that the exception to the broad anti-injunction provisions of Section 7421(a) contained in 26 U.S.C. § 6213(a) places restrictions on deficiency assessments and plaintiff argues that section 6213(a) prohibits immediate levies with no waiting period for the collection of tax except as provided in 26 U.S.C. § 6861.[4] Accordingly, plaintiff contends IRS was forced to proceed under section 6861 and, since the IRS never sent plaintiff a deficiency notice as provided in section 6861, the IRS did not follow the legislatively mandated procedures and thus injunctive relief can be had under section 7421(a).

The Government argues that since it proceeded under 26 U.S.C. § 6851 the procedures required in section 6861 are irrelevant, the section 6213(a) exception to the anti-injunction statute is inapposite and therefore plaintiff's action must be dismissed.

The threshold inquiry therefore becomes whether section 6851 or section 6861 is applicable to this controversy. Section 6851 provides for the termination of a taxable year and demand for an immediate payment of tax where jeopardy, i.e. prejudice against collection, is deemed present

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[4] 26 U.S.C. § 6861(a) provides that:

(a) *Authority for Making.*—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

by IRS. In contrast, section 6861 provides for the jeopardy assessment of a deficiency in tax as defined by 26 U.S.C. § 6211(a). Generally, a deficiency is defined by section 6211(a) as the amount by which the tax imposed by statute exceeds the amount of tax shown on a taxpayer's return. By definition then, such a deficiency could not be determined until a return for a taxpayer's full taxable period has been filed or until the due date for filing such a return has expired. In this case, there was no return filed by the taxpayer and so there could be no deficiency. Since there was no deficiency there could be no deficiency assessment and consequently section 6861 cannot apply in this case.

Irving v. Gray, 479 F.2d 20 (2d Cir. 1973) holds that section 6861 and section 6213(a) do not apply in the case of a jeopardy assessment made in respect to a departing or concealing taxpayer assessed under section 6851.[5] *See also* Williamson v. United States, No. 17992 (7th Cir. filed April 8, 1971); Parrish v. Daly, *supra*.

Plaintiff contends that *Irving* is not binding precedent because in that case there was no attack on the procedure used by IRS nor was there any question of the arbitrariness of the IRS's determination that a jeopardy assessment should be made.

With regard to plaintiff's first proffered distinction, we note the similarity of the chronology of the IRS's action in this case and in *Irving*, both of which in our opinion satisfy the provision of 26 U.S.C. § 6331(a), the general levy and distraint provisions of the Code.[6] Since we have

[5] Section 6851 does not contain its own assessment authority but, contrary to plaintiff's contention, this section derives its assessment authority from 26 U.S.C. § 6201. Irving v. Gray, *supra*.

[6] Although *Irving* involved a written termination of the taxable year, notice of levy and assessment of tax, we do not believe the oral effectuation of these procedures is improper. Section 6851 does not, by its terms, require a writing and neither 26 U.S.C. § 6303 (notice and demand for tax) nor 26 U.S.C. § 6155 (payment on notice and demand) require a writing. Also, the levy and distraint provisions of section 6331 permit a levy to be made by giving notice in person. *See* United States v. Oliver, 421 F.2d 1034 (10th Cir. 1970) and United States v. Bernstein, 287 F.Supp. 84 (S.D. Fla. 1968) which hold that property levied upon and seized under section 6331 need not be accomplished by written notice, actual notice and demand are sufficient. Finally, we perceive that the nature of the jeopardy proceeding under section 6851 is not suited to the cumbersome requirements of written notice, *cf.* Irving v. Gray, *supra* ("Section 6851 was enacted to allow IRS to prevent taxpayers from fleeing the country with taxable funds. . . . Under such circumstances, Congress has given IRS a little leeway to protect the revenues.")

previously determined that the summary assessment and levy procedure is not constitutionally impermissible, we reject plaintiff's argument that the procedures employed by the Government in this case were improper.[7]

We also reject plaintiff's challenge to the arbitrariness of the IRS's determination that there was jeopardy against the collection of these taxes which justified the termination of the taxable year. Plaintiff, relying upon Lucia v. United States, 474 F.2d 565 (5th Cir. 1973) and Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969), contends that the Government must have some basis in fact for the seizure and absent proof of this, no assessment can be made. *Lucia* and *Pizzarello* are patently distinguishable from this case because they do not involve jeopardy assessments under section 6851 but rather assessments under 26 U.S.C. § 6862(a) for unpaid wagering taxes.

The distinction is crucial because, unlike section 6862(a), section 6851(a) provides that the finding of the secretary or his delegate that jeopardy is present is presumptive evi-

[7] We also note that even though the chronology in Williamson v. United States, *supra*, does not follow section 6331 the court refused to restrain the collection and assessment of the tax.

dence of jeopardy. Thus, where the IRS, in the interest of collecting revenue, proceeds by proper steps under section 6851, its determination of the facts and their sufficiency to warrant resort to peremptory collection are not to be reviewed in injunction proceedings. United States v. Bonaguro, 294 F.Supp. 750, 753 (E.D.N.Y.1968), aff'd sub nom. United States v. Dono, 428 F.2d 204 (2d Cir. 1970), cert. denied, 400 U.S. 829, 91 S.Ct. 57, 27 L.Ed.2d 59 (1970). *See also* Transport Mfg. and Equipment Co. of Del. v. Trainor, 382 F.2d 793 (8th Cir. 1967); Clark v. Campbell, 341 F.Supp. 171 (N.D.Tex. 1972). In this connection plaintiff does not attack the veracity of the affidavits filed by the Government describing the procedures employed in the assessment and levy but contends that they do not go far enough because they do not elucidate the factual basis for the Government's jeopardy determination under section 6851 which necessarily concludes that plaintiff was a person liable to pay tax. We disagree. This proceeding is not a proper vehicle for this challenge and we conclude that the affidavits are sufficiently explicit to enable the court to determine without doubt that the Government's procedures were proper and adequate. We determine that further exploration of the IRS's motivation for the assessment would not affect our decision concerning jurisdiction and is thus not relevant to any of the issues before the court in this particular proceeding. We therefore grant defendant's motion for a protective order barring the taking of depositions of the IRS officials noticed by plaintiff.

From what we have said, it is apparent that the judicially created doctrine announced in Enochs v. Williams Packing Co., 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962) is inapplicable because it is far from clear that "under no circumstances could the Government ultimately prevail" in this case.

In light of the foregoing we grant the Government's motion to dismiss but we do point out that this decision does not foreclose plaintiff's opportunity for redress in subsequent proceedings presented to the court in a proper jurisdiction and procedural posture.

Appendix C.

UNITED STATES CODE, TITLE 26.

§ 443. Returns for a period of less than 12 months

(a) *Returns for short period.*—A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances:

. . . . . .

(3) *Termination of taxable year for jeopardy.*—When the Secretary or his delegate terminates the taxpayer's taxable year under section 6851 (relating to tax in jeopardy).

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§ 6201. Assessment authority

(a) *Authority of Secretary or delegate.*—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) *Taxes shown on return.*—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

(2) *Unpaid taxes payable by stamp.*—

(A) *Omitted stamps.*—Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary or his delegate, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary or his delegate determines to be liable for such tax.

(B) *Check or money order not duly paid.*—In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

(3) *Erroneous income tax prepayment credits.*—If on any return or claim for refund of income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

(2) *Federal unemployment tax.*—No unpaid amount of Federal unemployment tax for any calendar quarter or other period of a calendar year, computed as provided in section 6157, shall be assessed.

(4) *Erroneous credit under section 39.*—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit allowable by section 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

(b) *Amount not to be assessed.*—

(1) *Estimated income tax.*—No unpaid amount of estimated tax under section 6153 or 6154 shall be assessed.

(2) *Federal unemployment tax.*—No unpaid amount of Federal unemployment tax for any calendar quarter or other period of a calendar year, computed as provided in section 6157, shall be assessed.

(c) *Compensation of child.*—Any income tax under chapter 1 assessed against a child, to the extent attributable to amounts includible in the gross income of the child, and not of the parent, solely by reason of section 73(a), shall, if not paid by the child, for all purposes be considered as having also been properly assessed against the parent.

(d) *Deficiency proceedings.*—

For special rules applicable to deficiencies of income, estate, gift, and chapter 42 taxes, see subchapter B.

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§ 6211. Definition of a deficiency

(a) *In general.*—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.

(1) The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 31, and without regard to so much of the credit under section 32 as exceeds 2 percent of the interest on obligations described in section 1451.

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by subtitle A or B or chapter 42 was less than the excess of the amount specified in subsection (a) (1) over the rebates previously made.

(3) The computation by the Secretary or his delegate, pursuant to section 6014, of the tax imposed by chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

(4) The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to the credit under section 39, unless, without regard to such credit, the tax imposed by subtitle A exceeds the excess of the amount specified in subsection (a) (1) over the amount specified in subsection (a) (2).

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§ 6212. Notice of deficiency

(a) *In general.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

. . . . . .

(c) *Further deficiency letters restricted.*—

(1) *General rule.*—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar quarter, of estate tax in respect of the taxable estate of the same decedent, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b) (1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) *Cross references.*

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of—

(A) Deficiency attributable to change of election with respect to the standard deduction where taxpayer and his spouse made separate returns, see section 144(b).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a) (3) (C) and (D).

(C) Deficiency attributable to gain on sale or exchange of personal residence, see section 1034(j).

(D) Deficiency attributable to war loss recoveries where prior benefit rule is elected, see section 1335.

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§ 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) *Time for filing petition and restriction on assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such

notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) Exceptions to restrictions on assessment.—

(1) *Mathematical errors.*—If the taxpayer is notified that, on account of a mathematical error appearing upon the return, an amount of tax in excess of that shown upon the return is due and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c) (1) (restricting further deficiency letters), or section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section.

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§ 6331. Levy and distraint

(a) *Authority of Secretary or delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful

for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) *Seizure and sale of property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

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§ 6332. Surrender of property subject to levy

(a) *Requirement.*—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy

upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

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§ 6335. Sale of seized property

(a) *Notice of seizure.*—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) *Notice of sale.*—The Secretary or his delegate shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be

sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

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§ 6511. Limitations on credit or refund

(a) *Period of limitation on filing claim.*—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

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§ 6851. Termination of taxable year

(a) *Income tax in jeopardy.*—

(1) *In general.*—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the

income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

. . . . . .

(b) *Reopening of taxable period.*—Notwithstanding the termination of the taxable period of the taxpayer by the Secretary or his delegate, as provided in subsection (a), the Secretary or his delegate may reopen such taxable period each time the taxpayer is found by the Secretary or his delegate to have received income, within the current taxable year, since a termination of the period under subsection (a). A taxable period so terminated by the Secretary or his delegate may be reopened by the taxpayer (other than a nonresident alien) if he files with the Secretary or his delegate a true and accurate return of the items of

gross income and of the deductions and credits allowed under this title for such taxable period, together with such other information as the Secretary or his delegate may by regulations prescribe. If the taxpayer is a nonresident alien the taxable period so terminated may be reopend by him if he files, or causes to be filed, with the Secretary or his delegate a true and accurate return of his total income derived from all sources within the United States, in the manner prescribed in this title.

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§ 6861. Jeopardy assessments of income, estate, and gift taxes

(a) *Authority for making.*—In the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

. . . . . .

(d) *Amount assessable after decision of Tax Court.*—If the jeopardy assessment is made after the decision of the Tax Court is rendered, such assessment may be made only in respect of the deficiency determined by the Tax Court in its decision.

(g) *Abatement if jeopardy does not exist.*—The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect

of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.

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§ 6863. Stay of collection of jeopardy assessments

(a) *Bond to stay collection.*—When a jeopardy assessment has been made under section 6861 or 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary or his delegate, within such time as may be fixed by regulations prescribed by the Secretary or his delegate, a bond in an amount equal to the amount as to which the stay is desired, conditioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which, but for the making of the jeopardy assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If any portion of the jeopardy assessment is abated, the bond shall, at the request of the taxpayer, be proportionately reduced.

(b) *Further conditions in case of income, estate, or gift taxes.*—In the case of taxes subject to the jurisdiction of the Tax Court—

(1) *Prior to petition to Tax Court.*—If the bond is given before the taxpayer has filed his petition under section 6213(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such section, then the amount, the collection of which is stayed by the bond, will be paid on notice and demand at any time after the expiration of such period, together with interest thereon from the date of the jeopardy notice and demand to the date of notice and demand under this paragraph.

(2) *Effect of Tax Court decision.*—The bond shall be conditioned upon the payment of so much of such assessment (collection of which is stayed by the bond) as is not abated by a decision of the Tax Court which has become final. If the Tax Court determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Tax Court is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(3) *Stay of sale of seized property pending Tax Court decision.*—

(A) *General rule.*—Where, notwithstanding the provisions of section 6213(a), a jeopardy assessment has been made under section 6861 the property seized for the collection of the tax shall not be sold—

(i) if section 6861(b) is applicable, prior to the issuance of the notice of deficiency and the expiration of the time provided in section 6213 (a) for filing petition with the Tax Court, and

(ii) if petition is filed with the Tax Court (whether before or after the making of such jeopardy assessment under section 6861), prior to the expiration of the period during which the assessment of the deficiency would be prohibited if section 6861(a) were not applicable.

(B) *Exceptions.*—Such property may be sold if—

(i) the taxpayer consents to the sale,

(ii) the Secretary or his delegate determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or

(iii) the property is of the type described in section 6336.

(C) *Applicability.*—Subparagraphs (A) and (B) shall be applicable only with respect to a jeopardy assessment made on or after January 1, 1955, and shall apply with respect to taxes imposed by this title and with respect to taxes imposed by the Internal Revenue Code of 1939.

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§ 7422. Civil actions for refund

(a) *No suit prior to filing claim for refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

. . . . . .